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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-15

CONTINENTAL T.V., INC., A & G SALES, SYLPAC, INC., and S.A.M. INDUSTRIES, INC.,
Petitioners,

vs.

GTE SYLVANIA INCORPORATED,
Respondent.

On Writ of Certiorari to the Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. SYLVANIA FAILS TO DISTINGUISH SCHWINN

A. By Rearguing the Evidence, But Ignoring The Findings and the Evidence which Support the Verdict, Sylvania Demonstrates that Schwinn Cannot be Distinguished on Its Facts

The issue is whether on this record a *Schwinn* instruction was warranted. Sylvania has never contended that, assuming the correctness of the instructions, the evidence does not support the verdict. Nor has Sylvania ever challenged the Trial Court Findings as clearly erroneous. Nonetheless, Sylvania in trying to distinguish this case from *Schwinn* reargues the facts, and in disregard of the traditional standards of appellate review ignores the

Findings, the Instructions, and the evidence supporting the verdict.[1] For example, Sylvania asserts that "[n]o retailer had the right to veto Sylvania's store assignments." (Syl. Br. p. 9) But the evidence on which the jury found a conspiracy showed (e.g., R.T. 431, 1538-39, A. 130, 319-20), and Justice Clark expressly found (Findings, No. 16, Pet. App. 126) that Handy Andy, Sylvania's Sacramento dealer, exercised precisely that prerogative. Compare *United States v. General Motors Corp.*, 384 U.S. 127 (1966). Further attempting to destigmatize its practice, Sylvania avows that its dealers could "sell to anyone wherever situated" and that "no purchaser from Sylvania was . . . confined to a particular territory . . . ." (Syl.

[1]Fed. Rules Civ. Proc., Rule 52(a) provides that "Findings of Fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the Trial Judge to judge of the credibility of the witnesses". Findings are not "clearly erroneous" unless they are unsupported by substantial evidence contrary to the clear weight of the evidence, or induced by an erroneous view of the law. *John Blue Co. v. Dempster Mill Mfg. Co.*, 275 F.2d 668 (CA 8th, 1960); and see *United States v. United States Gypsum Co.*, 333 US 364, 394-395 (1948). Reviewing courts are, of course, bound to such standard and where the District Court merely chooses between two permissible views of the weight of the evidence a reviewing court is not entitled to substitute its contrary view. *United States v. Yellow Cab Co.*, 338 US 339 (1949); and see *Reconstruction Fin. Corp. v. Bankers Trust Co.*, 318 US 163 (1942).

Furthermore, a reviewing court may not usurp the Jury's function by weighing conflicting evidence, judging witness credibility and evaluating the verdict in that light. *Stancill v. McKenzie Tank Lines, Inc.*, 497 F2d 529 (CA 5th 1974). A verdict, supported by substantial evidence, may not be disregarded—Appellate non-review of conflicting evidence is the rule. *United States v. Socony-Vacuum Oil Co.*, 310 US 150 (1940); *Continental Air Lines, Inc. v. Wagner Morehouse, Inc.*, 401 F2d 23 (CA 7th 1968).

Sylvania, unable to attack either Justice Clark's Findings or the Jury's verdict, simply ignores both in its effort to show some benevolent purpose and effect respecting its post-sale dealer restriction.

Br. pp. 9, 34), and thus it imposed no restriction on resale territory or customers (Syl. Br. pp. 26, 34). These contentions flatly contradict the evidence (cited in extenso in our principal brief pp. 5-6) that dealers committed themselves not to resell except at Sylvania-approved locations, as well as the findings (Findings of Fact Nos. 7, 8, 13, Pet. App. 119, 120, 123) and Sylvania's own open court admissions (R.T. 3535, not printed in the joint appendix, R.T. 3575, A. 496) that because of the inherent nature of the television business, a dealer's maximum service area is limited to 25 to 50 miles from its store location, and that thus the jury issue was whether or not Sylvania utilized its "location practice" as a device to restrict Continental's resale *territories* (R.T. 3878, A. 479).

Yet again, Sylvania argues in this appellate proceeding that its resale restrictions "in every relevant market yielded effective competition with other Sylvania dealers . . ." (Syl. Br. p. 34), and that there was "guaranteed effective competition in the Sylvania product line in the Sacramento market." (Syl. Br. p. 11) But the evidence supporting the verdict and findings showed that one firm, Sylvania, managed the market and deployed dealers where it wanted them, and did so for the express purpose of eliminating resale competition. (Ex. F., R.T. 19, A. 25-28)[2] More than this, Sylvania's own records and

[2]Arguing the evidence to this Court, as though to the jury, Sylvania tries to dismiss its manual which instructed its salesmen on the elbow room restrictions by labelling the manual an "early intracompany" document and asserting that it was "never applied" in Northern California. (Syl. Br. p. 11, n. 7). The verdict and the trial judge's contrary findings, however, are supported by overwhelming evidence that the manual was followed to eliminate intrabrand competition in Northern California. (R.T. 475-77, 484-85, 492, 497-98, 536-41, 1122-27)

interrogatory answers showed that Sylvania persistently exercised its power to stifle the forces of resale competition in Sacramento in the years from 1962 to 1966. Before elbow room, there were many dealers there. After elbow room, Handy Andy had an effective monopoly in the sale of Sylvania products in Sacramento.[3]

Sylvania also argues repeatedly that it acted against Continental "as a consequence" of credit concerns (Syl. Br. p. 16) and that these concerns were "developing" before Continental shipped goods to Sacramento. (Syl. Br. pp. 15-17) The evidence (reviewed in detail in our principal brief, pp. 10-18) is overwhelmingly otherwise,[4] and

[3]By 1965 all Sacramento competition in Sylvania color sets was eliminated and competition in black and white sets was reduced to trivial proportions. By 1966 Handy Andy had the entire market. (Ex. FX, R.T. 1925-26)

The principal basis for Sylvania's contrary argument is testimony that in 1966 there was still a dealership in a town within a 50 mile radius of Sacramento, which handled a minimal amount of merchandise (R.T. 530-532, A. 166-168), and testimony that Sherman Clay had a store in Sacramento (A. 163-68, 268-271), which in 1965 handled about $10,000 of Sylvania goods; in fact, the Sylvania franchise for such a store was terminated in 1966 (R.T. 2912-13, A. 432). Manifestly, these trivialities do not undercut the convincing evidence that Sylvania and Handy Andy were deciding what outlets should operate in the Sacramento area, and that resale competition had been brought to a halt.

Sylvania also claims that expert testimony from Preston shows competition theoretically persisted in Sacramento. (Syl. Br. 11-13) Even if so interpreted, the trial judge and jury would not have been bound by Preston's opinion in the face of detailed evidence of what *actually* happened in that market. But, in fact, a reading of Preston's testimony shows that his theoretical analysis was predicated on numerous assumptions which were flatly contradicted by the evidence. (See the analysis of Preston in the dissenting opinion of Judge Browning, Pet. App. A. p. 104-106, especially footnote 15, p. 105-106 therein.)

[4]Perhaps the most telling single item is Exhibit BV, (A. 28), the wire reporting that Sylvania's regional credit official was withholding approval of Continental's last order pending information from the home office about the Sacramento situation. (See R.T. 1015-29, A. 258-66).

amply supports the verdict and the trial judge's finding that Sylvania's expression of concern about credit was a camouflage fabricated *after* Continental shipped goods to Sacramento.[5]

In addition to such direct contradictions of findings and evidence Sylvania uses innuendo and implication to distort the evidence which supports the verdict and the findings. Thus, for example, Sylvania euphemistically calls its restrictions "'franchis[ing]' with respect to locations," "a location practice," and a "selective" method of distribution (Syl. Br. pp. 2, 27, 46). In the same vein, it states that a "dealer authorized somewhere *as a Sylvania franchisee* was not authorized elsewhere" [different emphasis than original] and that its restrictions had to do with where dealers "might hold themselves out as Sylvania dealers" (Syl. Br. pp. 8, 30). These sanguine ways of putting the matter erroneously imply that Sylvania only restricted the locations at which Sylvania authorized

[5]A specific example of Sylvania's labored factual argument about credit is its assertion of a difference between its knowledge that Shahood, Continental's principal, had a Korean War era criminal record which it gained "at corporate headquarters in August 1965" and its knowledge of the same facts gained "in the field" at an earlier date, and its assertion that when it put its credit hold on Continental it was doing so "[a]s a consequence" of this new-found corporate headquarters knowledge. On this point, as on all the others it now reargues, Sylvania failed to persuade the trial judge or the jury. The evidence showed that the knowledge Sylvania belittles as knowledge "in the field" was that gained not by low-level personnel, but by the very people responsible for dealing with Continental, both as to sales and credit—namely, Sylvania's regional sales manager and regional credit manager—to whom Shahood had voluntarily disclosed his background many months before Sylvania increased Continental's line of credit. (Finding No. 15, Pet. App. B, 124-125). After that disclosure Sylvania's regional credit manager told Shahood that his exemplary business and family life during the intervening years far outweighed his youthful wrongs. (R.T. 1257-1262, not printed in Appendix.)

dealers could operate under its trade mark and could hold themselves out as its authorized representatives. Those assertions are clearly shattered by the evidence. For one thing, the franchise did not authorize a dealer to operate under Sylvania's name or mark at any location. (See Ex. 3; A. 18-22) But more importantly, evidence and the findings already cited show that Sylvania restricted the places to which dealers could ship goods and from which dealers could resell. Moreover, the jury was explicitly instructed that mere restricted distribution and "franchising by location" are perfectly lawful so long as resale restrictions limiting the places at which, or persons to whom resale may be made are not used. (R.T. 3435-3448, A. 480-493.)[6]

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[6]In Part A of its brief, p. 31-44, where Sylvania seeks to distinguish *Schwinn*, it repeatedly confuses the distinction between a location restriction on the places where a franchise is authorized to do business under the franchisor's mark or hold itself out as the franchisor's representative, and the restrictions it actually imposed on the locations at which a buyer can resell. For example, Sylvania's footnote 24, p. 32 asserts without basis that the remand orders in *Schwinn* and *Topco* authorized restrictions as to the locations from which resales could be made. Similarly, Sylvania's footnote 28, p. 36 claims that *Kaiser, Salco* and *Boro Hall* support Sylvania's position and makes the gratuitous assertion that "franchising by location . . . means nothing if it does not entail express or implied limitations upon the authority of the retailer to transship . . . to unauthorized locations." In fact, none of these cases, nor any other case so far as we can discover, even remotely suggests that a mere "location franchise" contains an implied restriction forbidding dealers to ship goods to other locations for resale. Indeed, in *United States v. General Motors Corp.*, 384 U.S. 127 (1966) this Court, by holding the latter type of restriction unlawful, yet declining to pass on the legality of the former, demonstrated its view that a location franchise and a location resale restriction are quite distinguishable. Inherent in the franchising of a trade mark or name is the right to restrict the location for which that permission is given; clearly, however, this is not the situation presented herein.

In its factual argument Sylvania (taking out of context a part of the instructions as did the majority below) asserts that under the instructions given a verdict for Continental was "virtually assured." (Syl. Br. p. 21) But a verdict for Continental was not at all assured unless the jury, as trier of the facts, believed Continental's evidence. At trial, Sylvania claimed that it acted unilaterally; that it merely franchised by locations, without restricting resales; and that it took action against Continental out of credit concerns. On the instructions given, if the jury believed Sylvania on even one of these factual defenses, a verdict for Sylvania, rather than Continental would have been "virtually assured." The truth that Sylvania ignores is that it lost on each such factual defense.

In sum, by trying to relitigate the facts Sylvania demonstrates that one cannot distinguish this case from *Schwinn* without a labored effort to ignore the instructions, to ignore the evidence which supports the verdict, and to ignore the trial court's detailed findings. The Court of Appeals should be reversed on the ground that the evidence warranted the verdict that Sylvania conspired to stamp out resale competition by utilizing post-sale location restraints as a device to restrict territories among its dealers.

B. The Analytical Distinctions Sylvania Attempts Between This Case and Schwinn are Equally Unavailing

Sylvania would distinguish this case from *Schwinn* on the ground that the territorial resale restraint in *Schwinn* was imposed by contract, whereas the territorial resale restraint here was "not by contractual compulsion but by

economic limitation inherent in the market." (Syl. Br., p. 38) But a contract always interacts with commercial realities. The reason Schwinn's arrangement segregated dealers is that, given the nature of the bicycle business, the restraint imposed was sufficient to achieve that effect. Precisely the same is true here. Given the nature of TV retailing, the form of restraint used by Sylvania is sufficient to achieve Sylvania's stated purpose of stamping out same brand competition and eliminating "vicious price cutting". (Exs. C and F, A. 23-25, A. 25-28) It is the purpose and effect of the restraint, not its form, which is crucial. *United States v. Masonite Corp.*, 316 U.S. 265, 278 (1942); *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964); *Standard Fashion Co. v. Magrane-Houston Co.*, 285 U.S. 346 (1922), *United Shoe Machinery Corp. v. United States*, 258 U.S. 451, 456-57 (1922).

Sylvania also argues that its resale restraint is more like an exclusive dealership (Syl. Br. p. 39) than like *Schwinn's* form of resale constraint. The contrary is plainly so. As Sylvania concedes, any arrangement by a manufacturer for "dealer spacing" is designed to confer market power on the dealer, thus giving the dealer additional incentive to make sales of the manufacturer's particular brand. (Syl. Br. p. 45) Market power means, of course, power to increase prices. In the case of an exclusive dealership, that power cannot be excessive; if the dealer uses such power to raise prices excessively dealers from other territories will transship merchandise to that dealer's territory. But where the manufacturer's spacing plan entails a resale restraint on dealers, such as that used by *Schwinn* and by Sylvania, the amount of market power conferred by the arrangement moves to

a higher order of magnitude. Now, when the protected dealer raises his price, no other dealer can challenge him.[7]

Despite the fact that Sylvania did not grant exclusive dealerships Sylvania also argues (Syl. Br. pp. 40-43) that resale restraints like the ones it uses might aid in implementing exclusive dealerships, and therefore that its resale restraints should be distinguished from those in *Schwinn*.[8] If that argument justifies restraints in the Sylvania form it would also justify those in the Schwinn form; there is no relevant difference. Beyond this, the decision of this Court in *Albrecht v. Herald Co.*, 390 U.S. 145, rehearing denied, 390 U.S. 1018 (1968) cuts the ground

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[7]Sylvania while, on the one hand, arguing that its restraint is like an exclusive dealership, and arguing also that its form of restraint is needed to make exclusive dealerships work (Syl. Br. 40-43), makes on the other hand the inconsistent claim that its restraint does not unduly dampen resale competition because, in fact, Sylvania does not link its resale restraint to an exclusive dealership. It is true enough that the negative impacts of a resale restraint which, like that here and in *Schwinn*, would be compounded if combined with an exclusive dealership. But that, as *Schwinn* holds, does not mitigate the fact that the resale restriction alone dampens competition excessively. What happened in Sacramento clearly exemplifies the severe anticompetitive impacts. Moreover, if the distinction Sylvania is trying to draw were valid, Schwinn's resale restrictions would have been lawful, too. Schwinn granted no exclusive dealerships to its franchisees. It remained free to add dealers if it decided to do so. The vice in the Schwinn scheme, like the vice here, is that it removes that decision from the market place, where dealers would be making it, to the manufacturer's board room. Indeed, if Sylvania's distinction were valid, *Dr. Miles* price fixing scheme would also be beyond reproach since Dr. Miles could at any time lower dealer resale prices.

[8]A forthcoming article may be of aid to the Court in comparing resale restraints like *Schwinn's* and Sylvania's with less restrictive arrangements like exclusive dealerships. See Martin B. Louis, *Vertical Distributional Restraints Under Schwinn and GTE Sylvania: The Partial Per Se Approach of the Former is the Proper One*, Mich. L. Rev. (forthcoming).

from under the contention. In *Albrecht,* a newspaper granted exclusive dealerships and, in order to be sure that dealers did not use resulting market power in detrimental ways, imposed an "ancillary" restraint fixing the *highest* price at which dealers could resell. Reasoning much as does Sylvania, the Court of Appeals asserted that the exclusive dealership rights were valid and that the price ceiling was necessary to implement this lawful arrangement. Citing *Schwinn,* this Court rejected that assertion. (390 U.S. at 153-154). In *Albrecht,* the otherwise unlawful ancillary restraint failed to gain validity on the ground that its purpose and effect was to *reduce* the market power dealers gained from exclusive dealerships. *A fortiori,* the Court should reject Sylvania's contention that if it had granted exclusive dealerships its unlawful resale restraints would gain validity on the ground their purpose and effect might be to *increase* the market power dealers gain from such exclusive dealerships.[9]

Sylvania's claim that its form of restraint is more like a primary responsibility clause than the *Schwinn* form of restraint (Syl. Br. p. 37) is also erroneous. A primary responsibility clause does not keep any dealer from enter-

[9]Relying on dicta from *Schwinn* (388 U.S. at 376), Continental has conceded that exclusive distributorships are presumptively lawful, absent resale restraints on the dealer. (Cont. Br., p. 44) This reading of the *Schwinn* dicta is not the only possible one. The *Schwinn* opinion's citation of *United States v. Colgate & Co.,* 250 U.S. 300 (1919) may imply no more than that a manufacturer may " 'franchise' certain dealers to whom, alone, he will sell" only where the manufacturer acts *unilaterally.* This possibility as to the meaning of *Schwinn* is what Professor Turner seems to allude to in the quotation set forth in footnote 34, page 42 of Sylvania's brief. In any event, the citation of *Schwinn* in Justice White's *Albrecht* opinion clearly implies that the granting of an exclusive franchise does not validate an otherwise unlawful resale restraint.

ing any market it wishes to enter or from offering competition to any dealer anywhere.[10] Sylvania's restraint does keep dealers from offering competition in other markets, just as it kept Continental out of Sacramento.

II. SCHWINN IS SOUND LAW REFLECTING SOUND POLICY AND NOTHING IN THE ARGUMENT OF SYLVANIA OR THE AMICAE SUGGEST GROUNDS TO RECONSIDER IT

Sylvania argues that this Court should validate Sylvania's restrictive distribution system by overruling *Schwinn.* Amicae echo this theme. These arguments imply that *Schwinn* was a novel innovation and that it has been much distinguished. Few characterizations could be less accurate. The analytical and the policy roots of *Schwinn* are deeply embedded in the jurisprudence of this Court, and *Schwinn* itself has not only been regularly followed, but extended.

A. Schwinn Accurately Applied Prior Law

Sylvania, citing Robinson, suggests with some disdain that *Schwinn* is based on the " 'ancient rule against restraints on alienation'," implying that the case was a novel and ill-starred adventure into antiquarianism (Syl.

[10]If a primary responsibility clause is deliberately administered with the purpose and effect of keeping a dealer from reselling in markets assigned as the primary responsibility of other dealers, this arrangement, too, falls under the rule against resale restrictions. E.g., *Reed Brothers, Inc. v. Monsanto Co.,* 525 F.2d 486, cert. denied, 46 L.Ed.2d 645, 96 S.Ct. 787 (1975); *Hobart Brothers Company v. Malcolm T. Gilliland, Inc.,* 471 F.2d 894 (5th Cir. 1973).

Br. 52).[11] In fact, it was not *Schwinn,* but Justice Hughes' opinion in *Dr. Miles* which brought that very relevant common law concept into the service of antitrust:

> "But because a manufacturer is not bound to make or sell, it does not follow that in case of sales actually made he may impose upon purchasers every sort of restriction. Thus a general restraint upon alienation is ordinarily invalid. 'The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void. "If a man," says Lord Coke, in Coke on Littleton, section 360, "be possessed of a horse or any other chattel, real or personal, and give his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him, so as he hath no possibility of reverter; and it is against trade and traffic and bargaining and contracting between man and man."' *Park v. Hartman* [153 Fed. Rep. 24]. See also Gray on Restraints on Alienation, §§ 27, 28." (220 U.S. at 404-05)

It is notable that this Court rejected the claim by Dr. Miles, now echoed by Sylvania, that a manufacturer has an inherent interest in controlling resales (220 U.S. at

[11] Two of Sylvania's secondary authorities, Robinson and Pollock, are advocates whose arguments must of course be considered but for whom we do not suppose Sylvania claims any scholarly objectivity.

407), and that Dr. Miles, like Sylvania, asserted (220 U.S. 375) and this Court denied (220 U.S. 407) that manfacturers had a reasonable need to reduce resale competition and enlarge dealer profits in order to induce dealers to favor sale of its product. In *Dr. Miles* this Court also stressed that the public interest is the primary concern (220 U.S. at 406), and that any advantage to manufacturers in the maintennace of fixed retail prices could not lawfully be attained

> "by agreements restricting the freedom of trade on the part of dealers who own what they sell. As to this, the [manufacturer] can fare no better . . . than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other." (220 U.S. at 407-08)

That the rationale of *Dr. Miles* comprehended the Sherman Act goals of dealer independence and consumer welfare is also clear. As Justice Hughes there stated:

> "But because a manufacturer is not bound to make or sell, it does not follow in case of sales actually made he may impose upon purchasers every sort of restriction. Thus, a general restraint upon alienation is ordinarily invalid." 220 U.S. at 404.
>
> "[The manufacturer] having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic." 220 U.S. at 409.

In *United States v. A. Schrader's Son, Inc.,* 252 U.S. 85 (1920), this Court resounded these same themes, making clear that *United States v. Colgate & Co.,* 250 U.S. 300 (1919) in no sense diminished them. Justice McReyn-

olds' opinion stresses that the manufacturer may not enter into agreements with dealers which "take away dealers control of their own affairs." (252 U.S. at 100) See also *Frey & Sons, Inc. v. Cudahy Packing Co.*, 256 U.S. 208 (1921).

The decision in *Schwinn* was nothing more nor less than the application of the *Dr. Miles* rationale to another situation which in principle it governs. Every vice the *Dr. Miles* opinion found in resale price restrictions appears as clearly in restrictions on where and to whom a buyer may resell. Both types of restriction have the purpose and effect of giving market power to dealers by dampening resale competition. Both tend toward higher prices. Both diminish dealer independence. Both remove resale decisions from the market place and assign them to the administered judgment of the manufacturer where a competitive system would mandate that they be made by the traders who make the investment.

Similarly, every justification that can be offered for a *Schwinn* or Sylvania resale restraint can as plausibly and convincingly be offered for a *Dr. Miles* restraint. With identical force and effect, either restraint could be used to "attract aggressive dealers, improve [the manufacturer's] product image and expand its market share" (Syl. Br. p. 10); both reflect the manufacturer's choice of the way to "maximize its interbrand competitive potential" (Syl. Br. p. 30). Again, resale price restraints are not saved by the fact that, since the manufacturer controls the matter, it can direct that prices be reduced if it concludes that it has conferred too much market power; so neither should restrictions on where goods can be resold be saved merely because the manufacturer has

the power to add additional dealers if it concludes that too much power has been conferred. (Syl. Br. p. 46)

It is no occasion for surprise that commentators insist on the fundamental identity of resale price and resale customer and territorial restraints, whether or not they view such restraints as seriously harmful.[12] As one commentator put in it insisting that the same rule should apply to resale restraints on price and territory:

> "[I]t can make little policy sense to say that businesses cannot agree to one restraint but that they can agree to another which is functionally the same. The rules established for comparable restraints ought to yield consistent results. If there is not at least this level of consistency, then the rules are absurd and can serve no policy function except charade."[13] (Carstensen,

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[12]Compare Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 Colum. L. Rev. 282, 283, 287-88 (1975); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 Yale L.J. 373, 403 (1966); and Note, *Refusals to Deal by Vertically Integrated Monopolists*, 87 Harv. L. Rev. 1720, 1731-32, 1737 (1974), with Comanor, *Vertical Territorial and Customer Restrictions: White Motor and its Aftermath*, 81 Harv. L. Rev. 1419 (1968).

[13]It hardly need be stressed that Sylvania's repeated practice of equating (1) manufacturer power to grant market power to dealers to induce them to push its brand and (2) benefits to interbrand competition is totally fanciful. Interbrand competition between manufacturers prospers when there are a large number of manufacturers competing with each other on price and quality and profits fall to the level of a reasonable return. To assert that competition is aided by allowing manufacturers to vie with each other through their success in attracting dealers by conferring market power on them in the resale market, certainly distorts common conceptions about what competition is about.

It is also clear that Sylvania's scale efficiency justification for resale restrictions (Syl. Br., p. 40) has little to do with reality. Efficient scale, like any other kind of efficiency, is maximized through the process of incremental decisions made and tested in the market place, not by a monolithic decision maker planning on a macro scale how resources should be allocated.

Vertical Restraints and the Schwinn Doctrine: Rules For Creation and Dissipation of Economic Power, 26 Case Western Reserve Law Review 771, 825 (1976))

Sylvania also attacks *Schwinn* by asserting that the distinction that case drew between sales and consignments is inconsistent. (Syl. Br. 53-54) But that distinction is intimately related to the policies which *Schwinn* carries forward. Where the integrated manufacturer makes the investment and takes the risk at the resale level the market is directly engaged to test the judgments the manufacturer makes about where, to whom and at what prices to sell. In a competitive economy it is appropriate for such a manufacturer to make the decisions, for precisely the same reasons that the dealer should make them when the dealer bears the risk. Also, it is no threat to dealer independence for the integrated manufacturer to make such decisions.[14]

Furthermore, the distinction between consignment and sales which Sylvania attacks is not original to *Schwinn.*

[14]To reject the importance of dealer independence as a Sherman Act goal would be to reject not only *Dr. Miles* and *A. Schrader's Sons, supra,* but it would also be to reject cases like *Simpson v. Union Oil* and *Albrecht v. The Herald Co., supra,* which emphasize this policy concern in other contexts. Important as the economic considerations served by a competitive market are, these have never been taken by the Court as the sole goal of the Sherman Act. When one views the act in a historical context, it becomes clear that the act expresses an abiding American conservatism which seeks out ways to divide, limit and diffuse both governmental and private power. See Hofstadter, "What Happened to the Antitrust Movement?" in *The Paranoid Style in American Politics and Other Essays,* 233 (1965). See also Judge Browning's dissent, Pet. App. A. 87, et seq., and *United States v. Aluminum Co. of America,* 148 F2d 416, 428-29 (2d Cir. 1945).

It, too, derives directly and explicitly from *Dr. Miles* (220 U.S. at 395-397), and has been repeatedly applied both in resale price cases *United States v. General Electric Co.,* 272 U.S. 476 (1926); *Simpson v. Union Oil Co.,* 377 U.S. 13 (1964), and resale market division cases. *FTC v. Curtis Publishing Co.,* 260 U.S. 568 (1923); and *Schwinn.*

B. Schwinn Has Been Consistently Applied and Extended

Sylvania's suggestion that *Schwinn* is much distiguished is also at odds with reality. *Schwinn* was the Bedrock authority for *United States v. Topco Associates, Inc.,* 405 U.S. 596 (1972) where this Court held that benefits to interbrand competition cannot justify injury to intrabrand competition. In *Albrecht v. Herald Co.,* 390 U.S. 145, rehearing denied, 390 U.S. 1018 (1968) this Court cited *Schwinn* in support of its holding that the court below could not properly assume that vertical price restrictions imposed by a newspaper were valid. See also *Otter Tail Power Co. v. United States,* 410 U.S. 366, rehearing denied, 411 U.S. 910 (1973), and *United States v. Glaxo Group, Ltd.,* 409 U.S. 818 (1973), in which this Court assumed the authority of *Schwinn.* Moreover, lower court cases applying Schwinn are legion.[15]

[15]E.g., *Noble v. McClatchy Newspapers,* 533 F.2d 1081 (9th Cir. 1975), modif. denied, 537 F.2d 1030 (9th Cir. 1976), cert. petition pending U.S. S.Ct. Dkt. No. 76-242; *Reed Bros., Inc. v. Monsanto Co.,* 525 F.2d 486 (8th Cir. 1975), cert. denied, 46 L.Ed.2d 645, 96 S.Ct. 787 (U.S. S.Ct. 1976); *Pitchford v. Pepi Inc.,* 531 F.2d 92 (3d Cir. 1976), cert. denied, 49 L.Ed.2d 387, 96 S.Ct. 2649 (U.S. S.Ct. 1976); *Eastex Aviation, Inc. v. Sperry & Hutchinson Co.,* 522 F.2d (5th Cir. 1975); *Cooper Liquor, Inc. v. Adolph Coors Co.,* 506 F.2d 945 (5th Cir. 1975), rehearing denied, 509 F.2d 758 (5th Cir. 1975); *Adolph Coors Co. v. FTC,* 497 F.2d 1178 (10th Cir. 1974), cert. denied, 419 U.S. 1105

Finally, Sylvania contends (Syl. Br. pp. 54-48) that there is an inconsistency between the legal power of a manufacturer to refuse to franchise a new or "stranger" dealer in the first instance, even though that decision be based on the ground that the manufacturer does not want any additional dealer selling in the territory where the stranger sells, and the legal disability *Schwinn* imposes on a manufacturer by precluding the manufacturer, once it has franchised a dealer, from exacting from that dealer a commitment not in the future to sell in particular markets where the manufacturer does not want additional dealers. Actually, a manufacturer's powers and disabilities vis à vis the "stranger" are essentially the same as its powers and disabilities with reference to its current dealers. So long as concert with others is scrupulously avoided, the manufacturer who unilaterally refuses to take on a new dealer is a classic example of a manufacturer exercising

(1975); *Hobart Bros. Co. v. Malcolm T. Gilliland, Inc.*, 471 F. 2d 894 (5th Cir. 1973), cert. denied, 412 U.S. 923 (1973); *Interphoto Corp. v. Minolta Corp.*, 417 F.2d 621 (2d Cir. 1969); *Hensley Equipment Co. v. Esco Corp.*, 383 F.2d 252 (5th Cir. 1967), amended on other grounds, 386 F.2d 442 (5th Cir. 1967); *Adolph Coors Co. v. A. & S. Wholesalers, Inc.* 1975 CCH Trade Cases ¶ 60,187 (D. Colo. 1975); *United States v. Revlon, Inc.*, 1975 CCH Trade Cases ¶ 60,202 (S.D.N.Y. 1975); *Fairfield County Beverage Distributors, Inc. v. Narragansett Brewing Co.*, 378 F.Supp. 376 (D. Conn. 1974); *Todhunter-Mitchell & Co., Ltd. v. Anheuser-Busch, Inc.*, 375 F. Supp. 610 (E. D. Pa. 1974), mod. on other grounds, 383 F.Supp. 586 (E. D. Pa. 1974); *Cook v. Ralston Purina Co.*, 366 F.Supp. 999 (M. D. Ga. 1973); *Bowen v. New York News, Inc.*, 366 F.Supp. 651 (S.D.N.Y. 1973), aff'd in part and reversed in part, 522 F.2d 1242 (2d Cir. 1975), cert denied, 48 L.Ed.2d 177, 96 S.Ct. 1667 (1976); *Dobbins v. Kawasaki Motors Corp.*, 362 F.Supp. 54 (D. Ore. 1973); *Ammerman v. Bestline Products, Inc.*, 352 F.Supp. 1077 (E. D. Wis. 1973); *Lepore v. New York News, Inc.*, 346 F. Supp. 755 (S.D.N.Y. 1972); *United States v. Glaxo Group Ltd.*, 302 F.Supp. 1 (D. D. C. 1969), reversed on other grounds, 410 U.S. 52 (1973); *Sherman v. Weber Dental Mfg. Co.*, 285 F.Supp. 114 (E. D. Pa. 1968).

rights under *United States v. Colgate & Co.*, 250 U.S. 300 (1919). That *Colgate* defense would also be available to a manufacturer which divides resale markets by announcement and refusal to deal, so long as it, too, scrupulously avoided concerted action. Indeed, Sylvania requested and obtained a *Colgate* instruction to the jury in this very case. (A. 490, 492-493) But just as the manufacturer cannot through contract, combination or conspiracy, confine the price at which, places in which and persons to whom an existing dealer will sell, the manufacturer could not by conspiracy keep the "stranger" dealer from entering a territory where the manufacturer did not want him. For example, both *Schwinn* and *United States v. General Motors Corp.*, 384 U.S. 127 (1966) would make it unlawful to exact from existing dealers a commitment not to resell to a "stranger" serving a territory where the manufacturer wanted no additional dealers.

III. THE FAILING COMPANY CLAIM APPROACHES THE FRIVOLOUS

Sylvania cites opinions of its executives that Sylvania might have gone out of business in 1962 if it had not changed its distribution system. (Syl. Br. pp. 5-6) This evidence does not make out a jury case under the failing company doctrine. There is absolutely no evidence that Sylvania, either generally or in its TV business, was not earning a reasonable return, or that its 2% market share deprived it of needed scale efficiencies.[16] Evidence that

[16]There was no evidence that Sylvania could not recruit dealers; indeed, in contrast to *Sandura v. FTC*, 339 F2d 847 (6th Cir. 1964), Sylvania was trying to get rid of dealers, not to attract them.

Sylvania might have withdrawn from the competitive game unless it could break the rules is not evidence warranting suspension of the Sherman Act. Clearly, Sylvania at no time considered or implemented less restrictive lawful alternatives which were available to it. (See Pet. Br. pp. 48-49, 53.) If subjective dissatisfaction with market share makes out a failing company defense, then any firm which insists on an antitrust exemption as its price for staying in a market would be entitled to have one.

There is no evidence that Sylvania's 2% market share was not profitable; or that other TV manufacturers, with comparable or smaller shares, had to adopt similar post-sale restrictions to stay in business.

There is certainly not a shred of evidence that in 1964 and 1965, after it had gained a larger market share, Sylvania had to restrict resale competition and make predatory attacks against violators in order to stay in the TV business. On this record to have submitted the case to the jury on a failing company instruction would have been to allow the jury to license antitrust violations for any firm which was disappointed with the results of the competitive game.[17]

[17]Sylvania's offered instruction was not a correct statement of the "Failing Company" doctrine and was correctly refused for this reason alone. (See Pet. Br. p. 64) Contrary to Sylvania's view (Syl. Br. p. 68, Fn. 56), the Trial Court was not required to re-write such proffered instruction in order to correctly state such doctrine. It is not error to refuse a requested instruction which is not an entirely correct statement of the law or which is likely to mislead or be misunderstood by the Jury. *Cherry v. Stedman*, 259 F2d 774 (CA 8th 1958); *Mann v. Anderson*, 447 F2d 533 (7th Cir. 1971).

Sylvania has shown no justification as to why, after five years of trial preparation, it should be entitled to further trial in an effort to produce "Failing Company" evidence sufficient to create a jury issue. Compare *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.* ..... U.S. ..... (U.S. Sup. Ct. No. 75-904, decided Jan. 25, 1977.)

IV. NO SERIOUS RETROACTIVITY ISSUE IS PRESENTED

Sylvania never explains why it had during 1962-1965 "every reason to believe" its resale restraints were valid (Syl. Br. p. 69) when the Department of Justice had announced as early as 1955 its position that such restraints were per se unlawful, (see Hearings on Automobile Marketing Legislation Before a Subcommittee of the House Comm. on Interstate and Foreign Commerce, 84th Cong. 1st Session 89, 362 (1955)), and had been successfully challenging substantially identical practices in the courts during the intervening years. If Sylvania's claim is that its variation in the form of its restraint assured it of safety, it could hardly have been very reliant, particularly in light of *United States v. Masonite Corp.*, 316 U.S. 265 (1942) and *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

Furthermore, the facts of this case, persistently ignored by Sylvania, destroy such claim. Sylvania acted not unilaterally but at the insistence of its co-conspirator Handy Andy, and then with devastating predatory conduct that all but destroyed Continental. In light of such conspiracy and the outrageousness of its conduct, Sylvania could have hardly believed itself shielded by some doc-

trine of per se legality. The most Sylvania could conceivably have hoped was for a rule of reason instruction when its practice was challenged. Sylvania can point to no prior rule like that involved in *Simpson,* giving assurance in any degree that its conduct was legal.

Sylvania seeks here to gain a retroactivity defense not just for its overall scheme of resale restraints, but for a blatantly predatory attack on Continental. Sylvania had to have known that its post-sale restraint predatorily enforced at the request of a protected dealer was fraught with illegality, at best. Certainly, Sylvania could not have equitably relied on any prior doctrine of lawfulness under these circumstances. (Compare *Cantor v. The Detroit Edison Co.,* 96 S.Ct. 3110, 49 L.Ed.2d 1141 (U.S. S.Ct. 1976).

V. CONCLUSION

This case involves Sylvania's *use* of dealer resale restrictions to *achieve* closed territories. It thus requires merely a pedestrian application of the *Schwinn* doctrine to facts conclusively found by the Trial Judge and Jury.

The Judgment of the Court of Appeals should be reversed and the case remanded with direction that the District Court Judgment and Decree be reinstated in all respects.

Dated, February 3, 1977,

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